BEATRICE AT FERNANDEZ

v.

SISTEM PENERBANGAN MALAYSIA & ANOR

FEDERAL COURT, PUTRAJAYA
ABDUL MALEK AHMAD PCA
ALAUDDIN MOHD SHERIFF FCJ
NIK HASHIM JCA
[APPLICATION NO: 08-51-2003 (W)]
11 MAY 2005

CIVIL PROCEDURE: *Appeal - Leave to appeal - Federal Court - Conditions of appeal - Whether judgment of Court of Appeal raised point of general principle previously not decided by Federal Court - Whether a point of importance upon which further argument and a decision of Federal Court would be to public advantage - Whether intended appeal had prima facie case for success*

CONSTITUTIONAL LAW: *Fundamental liberties - Equal protection - Federal Constitution, art. 8 - Equality - Gender discrimination - Whether applies in collective agreements or employment contracts as between two private individuals - Whether protection in art. 8 only available to private individual as against the State - Whether constitutional law remedies available to private individual whose fundamental right has been violated by another private individual - Constitutional law as a branch of public law - Whether constitutional law litigation must necessarily involve the State as a party*

LABOUR LAW: *Employment - Termination of service - On ground of pregnancy as per collective agreement - Whether discriminatory - Whether collective agreement violates fundamental liberties under art. 8 Federal Constitution - Whether collective agreement must conform to tenets of equality under art. 8(1) - Protection against 'religion, race, descent, place of birth or gender' discrimination - Whether art. 8(2) applies to collective agreement - Whether contravenes art. 8(2)*

The terms and conditions of the appellant's employment with Sistem Penerbangan Malaysia ('the Airline') were governed by a collective agreement, cl. 2(3) of which provided that she would have to resign from her position as a flight-stewardess (or be terminated) if she should ever become pregnant. As it transpired, the appellant did become pregnant in the course of her employment, and the Airline, upon her refusal to submit her resignation, terminated her services. Aggrieved, the appellant brought an action in the High

Court praying for, *inter alia*, a declaration that: (i) the collective agreement was *ultra vires* art. 8 of the Federal Constitution and, therefore, void; and (ii) the termination of the appellant's services was in contravention of s. 14(3) of the Industrial Relations Act 1967 and ss. 37 and 40 of the Employment Act 1955 and, therefore, void. The learned judge rejected the appellant's claim and, on appeal, the justices of appeal upheld the decision of the learned judge on the following grounds, namely: (i) that the discord between the appellant and the Airline was a matter strictly within the realm of private law and, therefore, constitutional law could take no cognisance of it and public law remedies were, accordingly, unavailable; (ii) that art. 8(1) of the Federal Constitution did not apply as the collective agreement was not a piece of legislation to be taken cognisance of by the constitutional court but rather a 'contract' which was enforceable by way of an award of the Industrial Court; (iii) that art. 8(2) of the Federal Constitution had not been contravened as cl. 2(3) of the collective agreement was not discriminatory in terms of 'religion, race, descent or place of birth' or even 'gender'; (iv) that the Airline was not 'a government agency' or a 'public authority'; and (v) that ss. 37 and 40 of the Employment Act 1955 were irrelevant and had no application in respect thereof. Dissatisfied, the appellant applied for leave to appeal to the Federal Court.

Held (dismissing the application)

Per Abdul Malek Ahmad PCA delivering the judgment of the Federal Court:

[1] It had not been shown here that "the judgment of the Court of Appeal has raised a point of general principle which the Federal Court has not previously decided or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage". (*Datuk Syed Kechik Syed Mohamed & Anor v. The Board Of Trustees Of The Sabah Foundation & Ors* followed.) Hence, this was not a proper case in which leave to appeal should be granted by the Federal Court. (p 719 a-d)

[1a] It is simply not possible to expand the scope of art. 8(2) of the Federal Constitution to cover 'collective agreements' such as the one in the present case. To invoke art. 8 of the Federal Constitution, the applicant must show – which she was not able to show – that a 'law' or an 'executive action' had discriminated against her so as to controvert her rights under the said article. Constitutional law, as a branch of public law, deals with the contravention of an individual's rights by the Legislature or the Executive or their agencies; it does not extend its reach onto the infringement of an individual's legal rights by another individual. (p 720 c-e)

[1b] A collective agreement entered into as between an employer and a trade union of workmen is certainly not a 'law' within the contemplation of art. 8 of the Federal Constitution. The collective agreement herein was a 'lawful contract' entered into as between two private parties. There was no definite, special clause therein which so discriminated against the appellant that judicial intervention became necessary. The Airline was entitled, as an employer, to impose those special conditions which were peculiar to such a specialised occupation. (pp 720 e, g & 721 a)

[1c] The equal protection in art. 8(1) of the Federal Constitution extends only to persons in the same class. (p 721 c-e)

[1d] The collective agreement herein was not merely an 'agreement to negotiate'. (p 724 c)

[1e] All in all, the appellant's intended appeal had no *prima facie* case for success; hence, leave to appeal should not be granted. (p 725 a-c)

[Application for leave to appeal declined.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Terma-terma dan syarat perkhidmatan perayu dengan Sistem Penerbangan Malaysia ('Penerbangan') adalah dikawal oleh satu perjanjian bersama, di mana fasal 2(3)nya memperuntukkan bahawa perayu harus meletakkan jawatannya sebagai pramugari (atau diberhentikan) sekiranya beliau didapati mengandung. Seperti yang berlaku, perayu telah mengandung semasa dalam perkhidmatan dan telah diberhentikan oleh Penerbangan apabila beliau enggan meletakkan jawatan. Terkilan, perayu memulakan tindakan di Mahkamah Tinggi memohon, antara lain, deklarasi bahawa: (i) perjanjian bersama adalah *ultra vires* fasal 8 Perlembagaan Persekutuan dan, kerana itu, batal; dan (ii) pemberhentian perkhidmatannya telah melanggar s. 14(3) Akta Perhubungan Perusahaan 1967 dan ss. 37 dan 40 Akta Pekerjaan 1955 dan, kerana itu, batal. Yang arif hakim menolak tuntutan perayu dan, di rayuan, hakim-hakim rayuan telah mengesahkan keputusan yang arif hakim atas alasan-alasan berikut, iaitu: (i) bahawa pertelingkahan antara perayu dan Penerbangan adalah perkara yang jelas tertakluk kepada undang-undang persendirian dan, kerana itu, undang-undang perlembagaan tidak boleh mengambil maklum mengenainya dan begitu juga remedi undang-undang awam tidak boleh terlaksana kepadanya; (ii) bahawa fasal 8(1) Perlembagaan Persekutuan tidak terpakai, oleh kerana perjanjian bersama bukanlah suatu undang-undang yang perlu diambil tahu oleh mahkamah perlembagaan tetapi hanyalah suatu 'kontrak' yang harus dikuatkuasakan melalui award Mahkamah Perusahaan; (iii) bahawa fasal 8(2)

Perlembagaan Persekutuan tidak dilanggar oleh kerana perkara 2(3) perjanjian bersama tidak mendiskriminasi atas hal-hal 'ugama, bangsa, keturunan atau tempat kelahiran' atau pun 'jantina'; (iv) bahawa Penerbangan bukanlah sebuah 'agensi kerajaan' atau 'pihak berkuasa awam'; dan (v) bahawa ss. 37 dan 40 Akta Pekerjaan 1955 tidak relevan dan tidak terpakai kepada kes di sini. Tidak berpuas hati, perayu memohon kebenaran untuk merayu ke Mahkamah Persekutuan.

Diputuskan (menolak permohonan):
Oleh Abdul Malek Ahmad PMR menyampaikan penghakiman Mahkamah Persekutuan:

[1] Ianya tidak ditunjukkan di sini bahawa "penghakiman Mahkamah Rayuan telah membangkitkan suatu soal prinsip am yang tidak pernah diputuskan oleh Mahkamah Persekutuan atau suatu perkara penting di mana hujah-hujah lanjut mengenainya dan keputusan Mahkamah Persekutuan adalah bermanfaat untuk kepentingan awam". (*Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees Of The Sabah Foundation & Ors* diikuti). Oleh yang demikian, ini bukanlah kes yang sesuai di mana kebenaran untuk merayu harus diberi oleh Mahkamah Persekutuan.

[1a] Adalah tidak mungkin untuk meluaskan skop fasal 8(2) Perlembagaan Persekutuan sehingga meliputi 'perjanjian-perjanjian bersama' sepertimana kes di sini. Untuk melaksana fasal 8 Perlembagaan Persekutuan, pemohon mesti menunjukkan – yang mana beliau gagal menunjukkannya – bahawa sesuatu 'undang-undang' atau 'tindakan eksekutif' telah mendiskriminasikan dirinya sehingga menjejaskan hak-haknya di bawah fasal tersebut. Undang-undang Perlembagaan, sebagai cabang undang-undang awam, menangani pelanggaran hak-hak seseorang individu oleh Badan Perundangan atau Eksekutif atau agensi-agensi mereka; tangannya tidak sampai meliputi pelanggaran hak seorang individu oleh individu yang lain.

[1b] Perjanjian bersama yang dimeterai antara majikan dan kesatuan sekerja pekerja-pekerja bukanlah suatu 'undang-undang' menurut maksud fasal 8 Perlembagaan Persekutuan. Perjanjian bersama di sini adalah suatu 'kontrak sah' yang dimasuki oleh dua pihak persendirian. Tiada apa-apa pun di dalamnya yang amat mendiskriminasi perayu sehingga memerlukan campur tangan kehakiman. Selaku majikan, Penerbangan berhak untuk mengenakan syarat-syarat khas yang berkaitan, yang merupakan kebiasaan bagi pekerjaan khusus seperti itu.

[1c] Perlindungan sama rata di dalam fasal 8(1) Perlembagaan Persekutuan hanya meliputi orang-orang di dalam kelas yang sama.

[1d] Perjanjian bersama di sini bukan semata-mata suatu 'perjanjian untuk berunding'.

[1e] Pada keseluruhannya, rayuan yang diniatkan perayu tidak mempunyai kes *prima facie* untuk berjaya; kebenaran untuk merayu, dengan itu, tidak seharusnya diberi.

Case(s) referred to:
Dato' Hj Harun Hj Idris v. PP [1977] 2 MLJ 155 ***(refd)***
Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors and Another Application [1999] 1 CLJ 325 FC ***(foll)***
Kam Mah Theatre Sdn Bhd v. Tan Lay Soon [1994] 1 BLJ 9 SC ***(refd)***
Sistem Penerbangan Malaysia v. Yong Pau Ching [1997] 2 ILR 898 ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, s. 96(a)
Employment Act 1955, ss. 7, 7A, 37(1), 40, 43
Federal Constitution, art. 8(2)
Industrial Relations Act 1967, s. 14(3)

Other source(s) referred to:
United Nations Convention on the Elimination of all Forms of Discrimination against Women 1979

For the applicant - Gurubachan Singh Johal; M/s Nashir, Johal & Co
For the 1st repondent - Vijayan Venugopal; M/s Shearn Delamore & Co
For the 2nd respondent - S Ravichandran; M/s P Kuppusamy & Co

[Appeal from Court of Appeal; Civil Appeal No: W-02-186-1996]

Reported by Gan Peng Chiang

JUDGMENT

Abdul Malek Ahmad PCA:
Except for a handful of cases, it is not really the norm to publish judgments pertaining to leave to appeal but public interest necessitates the writing of one for this particular application.

The applicant rests her case upon art. 8 of the Federal Constitution wherein cl. (1) thereof states that all persons are equal before the law and entitled to the equal protection of the law.

The facts of her case were straightforward. She joined the first respondent as a Grade B flight stewardess and she was bound by the terms and conditions of a collective agreement dated 3 May 1988 which came into operation on 1 September 1987 for a period of three years. The said collective agreement was recognized by the Industrial Court and registered as "COG 81/88". It must be emphasized at this juncture that this collective agreement was binding on all stewardesses.

This point is highly relevant because cl. (2) of art. 8 of the Federal Constitution, which she is relying on, is there to ensure that there is no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender. It must be pointed out that "gender" was only added in subsequently and came into force only on 28 September 2001.

Paragraph (3) of cl. 2 of the First Schedule to the collective agreement requires all stewardesses in the applicant's category to resign on becoming pregnant and in the event she fails to resign, the first respondent shall have the right to terminate her services. The applicant became pregnant but she refused to resign. Acting upon the relevant provision of the collective agreement, the first respondent terminated her services. This led to her commencing proceedings at the High Court seeking a declaration, *inter alia*, that cl. 2, which deals with the notice of termination of employment, cl. 14, which sets out the provisions for maternity leave for special cabin crew which includes senior chief stewardesses and chief stewardesses, and cl. 19, which provides for the retirement age differently for different categories of female employees, of the collective agreement contravened art. 8 of the Federal Constitution rendering the collective agreement void. The applicant also prayed that her termination from service was void for contravening the Industrial Relations Act 1967, in particular s. 14(3) thereof, and the Employment Act 1955.

It must be noted that the applicant was employed by the first respondent on 14 October 1980 as a Grade B flight stewardess and at the time of her termination, the applicant was still in that same category.

On 29 February 1996, the High Court dismissed the application. She appealed but the Court of Appeal on 7 April 2003 came to the same conclusion and dismissed her appeal with costs.

The applicant applied for leave to appeal to the Federal Court against the decision of the Court of Appeal. We heard the applicant's application for leave to appeal to this Court on 10 August 2004. We reserved our decision as we needed more time to consider the merits and to obtain the grounds of judgment of the Court of Appeal which were not then available. These were made available sometime in October 2004 and we delivered our decision on 11 March 2005.

An appeal to the Federal Court is not automatic and all litigants in civil cases who wish to do so must first obtain leave from the Federal Court. In deciding whether leave to appeal is to be granted, the applicant must satisfy s. 96(a) of the Courts of Judicature Act 1964 (hereinafter the "CJA"). In *Datuk Syed Kechik bin Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors and Another Application* [1999] 1 CLJ 325, it was held that leave will not be granted unless both of the following criteria are satisfied by an intending appellant:

(a) the judgment of the Court of Appeal has raised a point of general principle which the Federal Court has not previously decided or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage; and

(b) if the point is decided in favour of the intending appellant, there is a *prima facie* case for success in the appeal.

We have carefully considered as to whether the judgment of the Court of Appeal has raised a point of general principle not previously decided or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage. We are unanimous that this is not a proper case where leave to appeal should be granted.

The issues of law raised by the applicant in the intended appeal to the Federal Court are as follows:

(a) whether art. 8 of the Federal Constitution is applicable to terms and conditions of a collective agreement between an employer and a trade union recognized by the Industrial Court where the terms and conditions are discriminatory in nature;

(b) whether paragraph (3) of cl. 2 and cl. 14 in the First Schedule to the collective agreement dated 3 May 1988 between the first respondent and the second respondent is in violation of art. 8 of the Federal Constitution which protects against discrimination;

(c) whether paragraph (3) of cl. 2 and cl. 14 in the First Schedule of the collective agreement dated 3 May 1988 is *ultra vires* the provisions of the Employment Act 1955;

(d) whether art. 8 of the Federal Constitution and the Employment Act 1955 guarantees the applicant the right to work and the right for continued employment during her pregnancy and to the enjoyment benefits of a female employee;

(e) whether the United Nations Convention on the Elimination of all Forms of Discrimination against Women 1979 is applicable to the terms and conditions of a collective agreement between the employer and a trade union which is recognized by the Industrial Court where terms and conditions are discriminatory in nature.

The thrust of her application rests on an allegation that the collective agreement contravened cl. (2) of art. 8 of our Federal Constitution which reads:

> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

We took time to examine this allegation carefully and we found that it is simply not possible to expand the scope of art. 8 of the Federal Constitution to cover collective agreements such as the one in question. To invoke art. 8 of the Federal Constitution, the applicant must show that some law or action of the Executive discriminates against her so as to controvert her rights under the said article. Constitutional law, as a branch of public law, deals with the contravention of individual rights by the Legislature or the Executive or its agencies. Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual. Further, the reference to the "law" in art. 8 of the Federal Constitution does not include a collective agreement entered into between an employer and a trade union of workmen.

We also observed that the job requirements of flight stewardesses are quite different from that of women in other occupations including the other categories of women employees in the same collective agreement. There are occupational benefits peculiar to the job which are not available in other occupations. Likewise, there are special conditions applicable peculiarly in this occupation, which the first respondent as the employer was entitled to impose.

It is not difficult to understand why airlines cannot have pregnant stewardesses working like other pregnant women employees. We take judicial notice that the nature of the job requires flight stewardesses to work long hours and often flying across different time zones. They have to do much walking on board flying aircrafts. It is certainly not a conducive place for pregnant women to be in.

In our present case, the collective agreement requires the resignation, or termination in the event of refusal to resign, if a stewardess becomes pregnant and this was a lawful contract between private parties. There is no definite special clause in the collective agreement that discriminates against the applicant for any reason which will justify judicial intervention.

The relevant provision of the collective agreement namely paragraph (3) of cl. 2 reads:

> (3) A female Cabin Crew except those specified in Clause 14 of the First Schedule and Training Check Stewardess shall resign from the Company on becoming pregnant. In the event she fails to resign, the Company shall have the right to terminate her services.

In the circumstances, in construing art. 8 of the Federal Constitution, our hands are tied. The equal protection in cl. (1) of art. 8 thereof extends only to persons in the same class. It recognizes that all persons by nature, attainment, circumstances and the varying needs of different classes of persons often require separate treatment. Regardless of how we try to interpret art. 8 of the Federal Constitution, we could only come to the conclusion that there was obviously no contravention. We are also in agreement with the views expressed by Suffian LP in *Dato' Haji Harun bin Haji Idris v. Public Prosecutor* [1977] 2 MLJ 155 at pp. 165 and 166 on this point.

The applicant chose to join the first respondent as a flight stewardess and agreed to be bound by the collective agreement. It would have been different if she had joined the first respondent as a member of its administrative staff. The applicant cannot compare herself with the ground staff or with the senior chief stewardesses or chief stewardesses as they were not employed in the same category of work.

At this juncture, it is appropriate to refer to the Industrial Court case of *Sistem Penerbangan Malaysia v. Yong Pau Ching* [1997] 2 ILR 898 where the dispute emanated from the summary dismissal of the claimant from the employ of the company, which she contended was without just cause or excuse. Whilst challenging the reasons for her dismissal, the claimant admitted her terms and conditions of employment were governed by the collective agreement vide Cognisance No. 8 of 1992. At the hearing, the company contended its right for summary dismissal when the claimant refused to tender her resignation, on the ground that she had become pregnant and delivered a child, thereby contravening cl. 2(3) First Schedule of art. 6 of the collective agreement. It was the claimant's contention that the company had granted her study leave for eighteen months during which period she had delivered a child. She submitted the company either varied the contract or is estopped from applying the provisions of the collective agreement.

It was held:

(a) in application of the law in regard to the variation occasioned by the supervening period of approved leave, the equitable doctrine of forbearance operating as an estoppel, the fundamentals of contractual requirements not excluded, and based on the reasonable test applied on the strict construction of terminology in cl. 2.3 of art. 6 of the collective agreement, it was the finding of the court that the termination of the claimant of a summary nature to be unreasonable and unduly harsh, having regard to the constitutional position that the right to livelihood was equated to the proprietary right of the individual;

(b) what was even more damaging to the company's case was that the human resources manager's admission that a new collective agreement taken cognisance by the court in which the seven-year qualification period was reduced to five years and the effective date was 1 September 1995 while the letter dated 13 September 1995 was the date of the termination. To the court, this alone would nullify the company's termination of the claimant and render it invalid;

(c) the court was unable to conclude with reasonable certainty the effect of the provisions of Part IX of the Employment Act 1955 in regard to maternity protection wherein s. 43 provides that any provision whereby any female employee relinquished her right under this part shall be void. It was also observed that s. 14(3) of the Industrial Relations Act 1967 reinforced the repugnancy idea of s. 43 of the Employment Act;

(d) the dismissal of the claimant was without just cause or excuse, and the court adjudicated backwages and reinstatement.

However, that case was different as the stewardess had been given study leave for eighteen months during the period she got pregnant and consequently delivered the baby. The Industrial Court Chairman said:

> In the opinion of this Court, the answer would lie upon what strict construction of interpretation are the words "on becoming pregnant" is to take. Having regard to the policy consideration of the company, as explained by COW1 and COW3, the logical approach by the company will be the anticipatory approach. That is to say, the company has the right to terminate on discovering someone is pregnant, "because it will affect or disrupt the operations, as it takes six months to train and qualify someone, as replacement." That will be a logical application of the strict rule, in order to pre-empt the operational problems – that makes sense.

To put it conversely, what is the purpose of terminating someone, who, having been given 18 months study leave, during which period all the terms are suspended and had in fact become pregnant (or already delivered a baby), now (on 1 January 1996) fit as a fiddle presents herself, ready willing and able to take up duties, for the company now, ex post facto, to terminate her.? The company is punishing the claimant after the fact of delivery, ie,: retrospectively. Whereas, in contrast, the application of the rule should be before the fact of delivery.

That is the strict interpretation of "on becoming pregnant" – not sooner not later. There is possibly some adverse consequences to the company before the delivery, but what is the consequence to the company after the delivery? In order to appreciate the logic of the company, one has to reflect on what COW2 said after the meeting with the claimant about her delivery of baby:

> Before breaking up, when claimant said she did not want to resign, we told her we have a facility on a yearly renewable contract basis of employment, and the company can consider if she wanted to apply after resigning.

Herein, lies the argument revolving around the question, whether it is reasonable and fair, or is it harsh and unjust on the part of the company to take the drastic measure of summary dismissal, in the special circumstances of the claimant's case?

In application of the law therefore in regard to the variation occassioned by the superverning period of approved leave, the equitable doctrine of forebearance operating as an estoppel, the fundamentals of contractual requirements not excluded, and based on the reasonable test to be applied on the strict construction of the terminology in cl. 2.3 art. 6CA, it is the finding of the Court that the termination of the claimant of summary nature is unreasonable, unfair, and unduly harsh in the circumstances (having regard also to the constitutional position that the right to livelihood is equated to proprietary right of the individual)…

….The Court will however leave the issue – of whether such CA provisions are repugnant to existing legislations, or contrary to law and therefore void – open, since the Court is unable to make a conclusion with reasonable certainty.

We have also looked at s. 40 of the Employment Act 1955 and totally agree with the Court of Appeal that it is of no assistance to the applicant. Unless and until the Employment Act 1955 is amended to expressly prohibit any term and condition of employment that requires flight stewardesses to resign upon becoming pregnant, such clauses are subject to our Contracts Act 1950 and continue to be valid and enforceable.

Clauses which are uncertain in their meaning and which require the signing of a formal agreement may be construed as "an agreement to negotiate". The Supreme Court in *Kam Mah Theatre Sdn Bhd v. Tan Lay Soon* [1994] 1 BLJ 9 referred to a contract which was dependent on the signing of a formal agreement and held at p. 15:

> We were of the view that there was no contract at all, because we found that the said document was dependent on the signing of a formal contract to be further negotiated and approved by both parties.

In the applicant's case, the collective agreement was obviously not an "agreement to negotiate". It was an agreement binding on all women who agreed to be employed as flight stewardesses working for the first respondent. While working for the first respondent, she would no doubt have enjoyed all the benefits accrued under the collective agreement.

We also took pains to examine s. 14(3) of the Industrial Relations Act 1967 and ss. 7, 7A and 43 of the Employment Act 1955 which were cited by the applicant, and unfortunately for her, those laws are of no relevance to her case. Section 37(1) of the Employment Act 1955 makes it mandatory for employers to pay maternity allowance to female employees on maternity leave. This section clearly protects the rights of working women in Malaysia. However, it does not prohibit provisions requiring female employees in specialized occupations such as flight cabin crew to resign if they become pregnant, simply because they cannot be working till they are due to deliver.

The Federal Court has the power to consider points of law that were not raised by the parties or in the court below. Thus, we exercised our power and in the interests of justice, we went a step further and explored other areas of our law to see if there is any valid ground for her to appeal.

We asked ourselves if the evidence adduced by the applicant disclosed any implied term that will require the first respondent to provide her with a ground job while she was pregnant or on maternity leave. We have examined the applicant's affidavits but could find no evidence that such an implied term existed. This is not surprising because a normal human pregnancy lasts thirty-seven weeks. If the maternity leave period is added on, it would mean that the first respondent would almost perpetually be finding ground jobs of about twelve months long for their stewardesses who have become pregnant. It is simply an impracticable situation and more importantly, for the purpose of this case, there is clearly no evidence to support any contention of an implied term.

Thus, this is a case where, upon careful examination of the law, it is better for the applicant's application to be dismissed at this stage to save her from incurring more legal fees unnecessarily. Both the High Court and Court of Appeal below had considered her case carefully based on existing laws. It is our view that the applicant has no hope of success even if we were to grant her leave to appeal. Granting her leave to appeal would only be giving the applicant false hopes. Regardless of how we view and review art. 8 of the Federal Constitution, we could only come to the same conclusion as the courts below that the collective agreement does not in any way contravene our Federal Constitution. The applicant has not established any grounds for this court to consider the availability of any further arguments which might allow this court to depart from the established principles of law discussed earlier.

In the circumstances, we had no other alternative but to dismiss her application for leave to appeal to the Federal Court with costs. The deposit is to go to the respondent to the account of taxed costs.